No. 15066

In the United States Court of Appeals

For the Ninth Circuit

BERNARD BLOCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief on Appeal

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JURISDICTION

Jurisdiction is based on Title 28, Section 1254, Rules 33 and 39, Rules of Criminal Procedure for the District Courts of the United States.

STATUTES AND RULES INVOLVED

Title 26, U. S. Code, Section 2554(a)—Unlawful and felonious sale of narcotics:

Rule 33, Rules of the District Courts of the United States, reading as follows:

"RULE 33. NEW TRIAL

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Fifth Amendment to the Constitution of the United States, as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life, or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

BRIEF STATEMENT OF THE CASE

The appellant was a duly licensed osteopathic physician in the State of Arizona. Under the laws of that state, he is allowed to treat narcotic addicts. For a period of two years, he had under his treatment a man named Gilbert Hernandez. R. S. Cantu, the narcotic officer of the Federal Government, located at Phoenix, Arizona, placed Hernandez under their employment and got Hernandez to introduce Cantu to the Doctor, and represented that Cantu also needed treatment for his addiction. (R. 27). Approximately two days prior to September 23, 1953, Cantu went to the office of Dr. Bloch and obtained narcotics from the said Dr. Bloch on representation that Cantu was a brother of Hernandez and was addicted and in need of medication. That said representations, in truth and in fact, were false.

In the trial of Dr. Bloch, in which reference is made in this court for the court to take judicial notice of its own record, (being No. 14536, *Dr. Bernard Bloch v. United States of America*), the said Cantu testified that he told Dr. Bloch that he did not want the narcotics for himself but for prostitutes whom he claimed were working for him. (R. 80, pages 104, 105 and pages 120 and 132 of Record 14536). This was strongly denied by Dr. Bloch (R. 40) and such denial is now confirmed by affidavits of Gilbert Hernandez. (R. 30)

Cantu testified that Hernandez was present during this purported conversation. Prior to and at the trial of the action, the defendant sought to have Hernandez

interviewed and Hernandez who was then under the employment as a Special Employee of the Narcotic Division of the Government made an appointment with Dr. Bloch's then attorney in a motel where an effort was made to entrap the attorney into giving some money to Hernandez, while narcotic agents listened in by prearrangement with Hernandez to the conversation in a room that was wired. The attorney, however, did not offer Hernandez any money and Hernandez did not answer any questions relating to the case to the attorney. All this was prearranged by government agents.

During the trial of the action, Hernandez was, according to his own affidavit, told that if he did not cooperate with the Narcotic Agents they would see that his probation in the state courts of Arizona on which he had been placed for a period of five years for forgery would be revoked. The narcotic agents, during the trial, according to his affidavit had him sequestered in the Federal Building and he was told not to tell anything to Wade Church, the attorney for the appellant herein, and was told not to discuss the case with any person and was not called as a witness by the government. The specific affidavit of Hernandez as to this pertinent portion is as follows:

> That shortly before the trial of the above-entitled matter in the above-entitled court, which said trial took place during the 25th, 26th and 27th of May, 1954, the exact date being not remembered by affiant, affiant was contacted by the Federal Narcotics Agents hereinbefore named, to wit, Patrick

Ross, George Dowell and R. S. Cantu, together with Dale Welsh, a member of the City Police Department of the City of Phoenix, Arizona, concerning the fact that one Wade Church, a practicing attorney in Phoenix, Maricopa County, Arizona, the representing the above-named said Bernard Bloch, during the said trial, was attempting to contact affiant and that affiant was told by said Officers to avoid the said Wade Church and not to tell him anything concerning the facts of the case which the Federal Government had against the said Bernard Bloch. That thereafter the said narcotic agents again contacted affiant and told him to call the said Wade Church, then affiant was told to inform the said Wade Church to meet him at a predesignated place at 25th Avenue and Jefferson Street, in the City of Phoenix, Maricopa County, Arizona, and from there to take him to the Plaza Apts Motel at 2511 West Van Buren Street, Phoenix, Maricopa County, Arizona, and to represent to the said Wade Church that affiant was living in said motel, Apartment 4; that affiant was told to take clothes to said Apartment 4 so that the said Wade Church would believe that he was living at said apartment; that affiant was with the said aforementioned narcotic agents and the said Dale Welsh and Bert Dobbs, another Federal Narcotic Agent, when the said Apartment 4, in the above-mentioned motel, was wired for recording; that affiant was told that agents and officers aforementioned would be in Apartment 3 with recording equipment. That affiant did meet the said Wade Church at the corner of 25th Avenue and Jefferson Street, by prearrangement, at which

time the said Wade Church requested affiant to go to his office to discuss the case against the said Bernard Bloch, that because of previous instructions given to affiant by the said Officers, affiant insisted that he would not discuss anything unless at his motel, towit, Apartment 4, Plaza Apts Motel, as aforementioned, that the said Wade Church thereupon agreed to take affiant to said apartment and that affiant and the said Wade Church did go to said apartment. That affiant had been previously instructed by the said aforementioned Federal Narcotic Agents and the said Police Officer Dale Welsh, not to disclose to the said Wade Church any matters concerning the evidence of the Government of the United States against the said Bernard Bloch, but instead to attempt to question the said Wade Church in such a manner so that the said Wade Church would be enticed to offer affiant a bribe for the production of testimony by affiant in behalf of the above-mentioned Bernard Bloch; that the said Ware Church did request that affiant discuss the facts of the case with him, but that as per previous instructions from the said aforementioned officers, affiant refused to disclose to said Wade Church any of the facts concerning the evidence against the said Bernard Bloch, and stated to the said Wade Church that he did not desire to become any more involved in the case than he already was and attempted to have the said Wade Church offer to him a bribe for his testimony, which the said Wade Church never did. That after conversation was had concerning the case against the said Bernard Bloch, and after affiant refused to divulge any informa-

tion to the said Wade Church by reason of his previous instruction, the meeting between the said Wade Church and affiant broke up and the said Wade Church thereafter left affiant at the said motel, Apartment 4; that thereafter the Federal Officers expressed their disgust with affiant for his inability to entrap the said Wade Church.

That during the course of the trial of the said case against the said Bernard Bloch, affiant was secreted in a room in the Federal Building in the City of Phoenix, Maricopa County, Arizona, and instructed not to discuss the case with any person. That affiant was subpoenaed by the Government of the United States to testify at the trial of the above-named Bernard Bloch, but that affiant was not called as a witness in behalf of the Government of the United States, nor was he called as a witness at all in said matter.

That the above-named Bernard Bloch, did not know until subsequent to the trial and subsequent to his conviction what the testimony of affiant would have been had he been called as a witness either by the Government of the United States, or by the defendant Bernard Bloch; that the said Bernard Bloch did not know of said evidence by reason of the fact that affiant refused to divulge any of said matters to the said Wade Church, by reason of instructions given to affiant under threat of revocation of probation.

That on many occasions from and after the introduction of the said R. S. Cantu to the said Bernard Bloch by affiant, the said Federal Officers threatened affiant and told him to leave Phoenix on many occasions giving affiant and his wife

sufficient narcotics to dispel withdrawal symptoms while riding on the bus from Phoenix, stating that the said Bernard Bloch had employed some man with a gun to "get" (Affiant) by reason of his participation in the case against the said Bernard Bloch; that affiant would take the narcotics offered himself and his wife, and would go to the Bus Depot with the said narcotic agents, but would not leave upon the buses indicated for their departure.

/S/ GILBERT RUIZ HERNANDEZ

Subscribed and sworn to before me
this 1st day of February, 1956.
(Seal) /s/ R. N. RENAUD
Notary Public
My Commission Expires: 3-15-58

Wade Church, Attorney-at-law of Phoenix, Arizona also made an affidavit. None of this evidence was discovered or discoverable until after the conviction of the appellant. Thereafter he made his motion for a new trial on February 13th, 1956, in the District Court of Arizona. The said Motion was based upon affidavits which were in no wise contradicted by the government. The only affidavit filed was a 5-line statement by Robert S. Murlless, Assistant United States Attorney, that "Gilbert Hernandez was not secreted nor sequestered during trial as alleged . . . " That he observed Gilbert Hernandez in open court on one of the trial days during trial of this cause. The Government did not deny any of the other charges. The court then ordered the mandate spread and committed the defendant. (R. 42, 43).

In the trial of the action the appellant had been stood convicted of an income tax violation and was asked at that time "if he was convicted of a felony" and he answered "yes". Subsequent to that trial the income tax conviction was reversed and the appellant sinc that time stands unconvicted of any felony. Nevertheless, evidence of that conviction introduced before the jury which tried Dr. Bloch affected his credibility.

After the mandate came down from the U. S. Court of Appeals, following a denial of certiorari by the Supreme Court of the United States, the appellant, on February 13, 1956, moved for a new trial in the United States District Court at Phoenix, Arizona (R. 78). That motion was heard on the grounds herein presented and denied by the District Court at Phoenix on that date. Bail was also denied by the District Court on that date and the appellant was remanded to the custody of the United States Marshal at Phoenix. He was later transported to the Federal Prison at Terminal Island, California. This appeal is from the order of Judge Ling, denying a new trial upon this motion.

SPECIFICATION OF ERRORS AND GROUNDS FOR APPEAL

The appellant specifies the following errors upon which he grounds his Motion for a New Trial.

I.

THE SUPPRESSION OF THE TESTIMONY OF WITNESS GILBERT HERNANDEZ CONSTITUTED GROUNDS FOR A NEW TRIAL AND DENIED THE APPELLANT DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

THE CONVICTION OF THE APPELLANT WAS BASED UPON FALSE AND PERJURED TESTIMONY AND THEREFORE VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

THE REVERSAL OF THE FELONY CONVICTION OF DR. BLOCH ON THE INCOME TAX EVASION, WHICH EVIDENCE AFFECTED THE CREDIBILITY OF THE WITNESS, ENTITLED THE APPELLANT TO A NEW TRIAL.

IV.

THE APPELLANT WAS UNLAWFULLY ENTRAPPED IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

I.

THE SUPPRESSION OF THE TESTIMONY OF WITNESS GILBERT HERNANDEZ CONSTITUTED GROUNDS FOR A NEW TRIAL AND DENIED THE APPELLANT DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The testimony of Officer Cantu, which is contained at pages 104, 105, and 120 and 132 of the original record, is to the effect that Officer Cantu testified that when he talked to Dr. Bloch he (Cantu) stated he did not want narcotics for himself but for some girls who were prostitutes, whom he claimed were working for him. He also stated that Gilbert Hernandez was present when he had the conversation about this matter of not wanting the narcotics for himself but for the prostitutes. At that time Hernandez was under subpoena by the government. He was also in the employment of the government and being paid by the government, and the government could have produced him to corroborate the testimony if it could have been corro-

borated. The defense sought to interview Hernandez to determine the true facts of the matter and tried to get in touch with Mr. Hernandez for the purposes of ascertaining the truth. Wade Church, a reputable attorney of Phoenix, Arizona, made an appointment with Mr. Hernandez for the purpose of getting him to tell the facts. Instead, however, the narcotic officers arranged a trap in which they had Hernandez meet Mr. Church in a room that was wired up to an adjoining room, and they asked Hernandez to try to solicit a bribe from Mr. Church, which Mr. Church refused. Mr. Hernandez, however, declined to discuss any facts.

Mr. Hernandez stated, in his subsequent affidavit, that he was ordered by the government to refuse to divulge any information to Church. This constituted a wilfull suppress of vital evidence which should have been available to the defendant in the trial.

In *Gordon v. United States,* 344 U.S. 414, this court said, in referring to the failure of the government to produce documents in the possession of the government:

> "Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.' "

While the court there was speaking of documents, yet the line of reasoning is just as important in the production of a government employed witness.

The court, there, further said, in referring to limiting the cross-examination based upon documents not produced:

> "But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony."

In the case of *Coates v. United States,* 174 Fed. 2d 959, the United States Court of Appeals for the District of Columbia had before it an appeal in a robbery case. A police officer had gone to the place where the robbery had occurred and found no evidence about any $20.00 bill there which was supposed to have been taken in the robbery in a crap game. The defendant did not learn of the possession of this corroborative evidence until after the trial was over and on motion for a new trial, under Rule 33, the District Court of Appeals for the District of Columbia remanded the case for a new trial under Rule 33.

In the instant case the appellant was unable to furnish and secure the evidence that Gilbert Hernandez was able to and did furnish in his affidavit until long after the trial, and he now urges it under Rule 33, Rules of the District Courts of the United States.

It was the duty of the government to have produced Hernandez and not to have suppressed the facts or knowledge that he had and not to have instructed him (as it did) not to give any information to the defense. Such conduct constituted extrinsic fraud upon the court and upon the defense, under the rule of

Throckmorton v. United States, 98 U.S. 61. Numerous cases hold that where a party is prevented from presenting his case fully to the court that it constitutes extrinsic fraud which entitles a person in equity, even after the time for appeal or other direction has expired, to set aside the judgment. The leading Federal case on that, *United States v. Throckmorton,* 98 U.S. 65, 25 L. Ed. 93.

> "When the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, a new trial should be granted."

Fraud is extrinsic such as the prevention of the presence of material witnesses which entitled a person to a new trial. *(Thompson v. Thompson,* 38 Cal. App. 2d 377, 106 P. 2d 60; *Hewett v. Linstead,* 49 Cal. App. 2d 607, 122 P. 2d 353, 355, 357.)

In *Hewett v. Linstead, supra,* an heir who knew of the existence of other heirs and for the purpose of defrauding such heirs and benefitting himself failed to notify the court of the existence of such heirs. He was guilty of extrinsic fraud. (And see: *Smith v. Smith,* 125 Cal. App. 2d 154, 270 P. 2d 613; *Sears v. Rusden,* 39 Wash. 2d 412, 235 P. 2d 819.)

Preventing the presence of a material witness is extrinsic fraud.

> *Godfrey v. Godfrey,* 30 Cal. App. 2d 370, 83 P. 2d 357.

It was the duty of the district attorney to produce Hernandez or allow him to be interviewed by the defense for this vital evidence.

In *State vs. Osborne,* 103 Pacific 62, it is stated:

> "It will not do to say that courts are impartial, and that both the courts and district attorney are there to protect the accused from wrong as well as to convict the guilty. The law is intended not only for protection against the acts of those who knowingly or intentionally err, but against those as well who do wrong unintentionally, or from an erroneous sense of duty. As stated by the Supreme Court of Michigan in *People v. Murray,* 89 Mich. 276, 286, 50 N.W. 995, 998, 14 L.R.A. 809, 28 Am. St. Rep. 294: 'It is for the protection of all persons accused of crime — the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule must be observed and applied to all.' "

In *Berger v. United States,* a late case, on the duties of the United States attorney, the court there stated:

> "The United States Attorney is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute

with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confided that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."

It will be noted that the affidavit of Hernandez was uncontroverted in any material respect on the Motion for a New Trial. The prosecutor only filed a five line affidavit in which he asserted that Hernandez had not been sequestered and that he saw him one day in the courtroom. In no other respect did he contradict the affidavit of Hernandez, which now stands as undisputed testimony.

Where there is evidence in the possession of the government which would aid the defendant, the government is duty bound to produce that evidence, since the government prosecutor represents all of the people and not merely one side.

Berger v. United States, 79 L. Ed. 1314, 295 U.S. 78.

The prosecutor had a duty to produce Gilbert Hernandez, who Cantu claimed was present during conversations between Cantu and the defendant regarding the purported getting of narcotics for "girls" who

were prostitutes, which testimony Gilbert Hernandez denies in affidavits and testimony before this court.

Where the government is in possession and control of evidence which, if presented, might have materially influenced the jury to reach a different conclusion and fails to produce it and it is not available to the defense until after the trial, a new trial should be granted as such evidence is newly after the trial and is material (*United States v. Smith,* Fed. case No. 16341; *Gichanov v. United States,* 281 Fed. 125), and failure to produce it at the trial was not owing to want of diligence (*Green & Moore Co. v. United States,* 19 Fed. 2d 130; *Silva v. United States,* 38 Fed. 2d 465) and where the prosecutor did not produce it but rather prevented the defendant from being able to produce it at the trial, such procedure amounts to extrinsic fraud, for which a new trial is always proper. *(U. S. v. Throckmorton,* 98 U. S. 61, 25 L. Ed. 93.)

DeLouis v. Meek, 2 Green (Iowa) 55, 50 Am. Dec. 491;
Smith v. Lowry, 1 John (N.Y.) 320.

In *Bryant v. Stilwell,* 24 Pa. 314, the court said:

> "To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents a jury from learning material facts, must take the consequence of any honest indignation which his conduct may excite . . . . . It ought to be understood that where one party has the subject matter of the controversy under his exclusive control, it is never

safe to refuse the witnesses on the other side an opportunity to examine it unless he is able to give a very satisfactory reason."

Even the Bible condemns conduct where it is declared "cursed be he that removeth his neighbor's landmark." (Deut. C. 27, 17.)

II.

THE CONVICTION OF THE APPELLANT WAS BASED UPON FALSE AND PERJURED TESTIMONY AND THEREFORE VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The use of evidence knowingly perjured violates the due process clause of the Fifth Amendment to the Constitution of the United States and makes judgments a nullity.

> *Mooney v. Holohan,* 292 U.S. 103, 79 L. Ed. 791; *Hysler v. Florida,* 315 U.S. 411, 86 L. Ed. 934.

> "If a state, whether by the active conduct or the connivance of the prosecution obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of the guilty or innocent and thereby deprives an accused of liberty without due process of law. *Mooney v. Holohan,* 294 U.S. 103, 79 L. Ed. 791."

A new trial may be granted where it appears that material testimony given at the trial was perjured.

United States v. Johnson, 149 Fed. 2d 31;
Martin v. United States, 17 Fed. 2d 973, Cert. denied, 275 U.S. 527, 72 L. Ed. 408.

Where a party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it, or did not know of its falsity until after the trial, he should be granted a new trial.

United States v. Johnson, 149 Fed. 2d 31.

III.

THE REVERSAL OF THE FELONY CONVICTION OF DR. BLOCH ON THE INCOME TAX EVASION, WHICH EVIDENCE AFFECTED THE CREDIBILITY OF THE WITNESS, ENTITLED THE APPELLANT TO A NEW TRIAL.

Since the prosecutor gambled on whether the felony conviction would stand and since the trial of the accused the felony conviction on the tax evasion issue has been reversed, it would be fair and just to grant a new trial under Rule 33 of the Rules of the District Courts of the United States, since this is newly discovered evidence which was not available at the time of trial, and if the prosecutor took his chances in asking the impeaching question, knowing that the first conviction might be reversed, he should now be required to take the results of that reversal.

In the instant case there was only one witness against Dr. Bloch and the question of his credibility as against the credibility of the defendant was in dispute. The weight then given to a conviction of felony, which has since been reversed, cannot be told and it is therefore important that the judgment be reversed so that he may have the weight of his testimony measured as against that of Cantu without the onus of the conviction of a felony.

IV.

THE APPELLANT WAS UNLAWFULLY ENTRAPPED IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The evidence clearly shows that the defendant was entrapped.

In *Sorrells v. United States,* 287 U. S. 435, the court stated that this issue may be raised at any stage of the proceeding. The evidence now shows clearly from the affidavit of Gilbert Hernandez that the defendant was entrapped and this is newly discovered evidence which was not available heretofore to the defense. Such newly discovered evidence is vital to clear the reputation of the appellant. Gilbert Hernandez was a government agent who became such during his treatment by the appellant. The full knowledge and scope of the entrapment as disclosed by Hernandez's affidavit was only obtained by the defense after

the trial had been concluded. We urged it in our Motion for a New Trial and we urge it again to show that the defendant was unlawfully entrapped and that he is entitled to a reversal of the judgment.

For all of which reasons we pray for a new trial in this case.

Respectfully submitted,

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